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No. 09-1138

Supreme Court, U.S.
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In The
Supreme Court of the United States

TAM TRAVEL, INC., *et al.*,

Petitioners,

v.

AMERICAN AIRLINES, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOSEPH M. ALIOTO, JR.
Counsel of Record
JOSEPH M. ALIOTO, SR.
THOMAS PAUL PIER
ALIOTO LAW FIRM
555 California Street
Thirty-First Floor
San Francisco, California 94104
(415) 434-8900
JAliotoJr@AliotoLaw.com

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Pursuant to Supreme Court Rule 15.7, petitioners Tam Travel, Inc, *et al.* ("Travel Agents") respectfully submit this supplemental brief in support of their petition for a writ of certiorari in order to call attention to new cases and other intervening matter not available at the time petitioners filed their reply brief on August 24, 2010. Specifically, recent developments in *Starr v. Sony BMG Music Entm't*, 592 F.3d 314 (2nd Cir. 2010) as well as decisions from the Supreme Court of Nebraska and a district court in Texas bear on the pending petition.

In their petition, Travel Agents identified a conflict between the decision below and this Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007) and *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937 (2009), as well as with decisions of the lower courts, most notably the Second Circuit's decision in *Starr* which held it was "incorrect" to require a complaint to allege facts that tend to exclude innocent explanations of defendants' conduct. *Starr*, 592 F.3d at 325; Pet. 18-19, 23. In their opposition, respondents did not contest that a decision requiring a complaint to exclude such explanations would establish a circuit conflict. Opp. 4. Instead, they opposed the petition by asserting that the Sixth Circuit's decision did not require the complaint to exclude defendants' explanations. Opp. 4-5. They argued that "the court of appeals below did *not* adopt the rule rejected in *Starr*," Pet. 4 (emphasis in original), that "[p]etitioners' claims of a conflict rest entirely on their recasting of the court of appeals' holding," Pet. 4-5,

and that "the court of appeals did just what this Court did in *Twombly*." Pet. 6. Petitioners argued in reply that respondents were alone in reading the Sixth Circuit's decision so benignly. In support, petitioners cited Judge Merritt's dissent, as well as lower court decisions which have interpreted the Sixth Circuit's decision as applying a "significantly-heightened pleading standard," *Dobyns v. United States*, 91 Fed.Cl. 412, 424 and n.29 (Ct. Fed. Cl. 2010) that requires courts to analyze the plausibility of defendants' explanations rather than the plausibility of the plaintiffs' claim. *Anderson News, LLC v. Am. Media, Inc.*, No. 09-2227, Slip. Op. at 12-14 (S.D.N.Y. Aug. 2, 2010), *available at* 2010 U.S.Dist.LEXIS 77718, *26-*31. Rep. 4-5.

Three recent developments show that the Sixth Circuit's decision in this case continues to be read in a way that conflicts with the decisions of this and other courts. First, on August 20, 2010, the defendants in *Starr* filed with this Court a petition for writ of certiorari in which they heavily relied on the "[ir]reconcil[able]" "modes of analysis in *Tam Travel* and [*Starr*]." Petition for a Writ of Certiorari at 25, *Sony Music Entm't v. Starr*, No. 10-263.[1]

Similarly, citing the Sixth Circuit's decision in an opinion issued on August 27, 2010, the Supreme

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[1] Both the petition here and the *Starr* petition have been scheduled for discussion at the Court's September 27, 2010 conference.

Court of Nebraska expressed a "concern[ ] that lower federal courts have interpreted the Court's plausibility standard as a heightened pleading standard," which "require[s] a complaint to contain specific factual allegations. . . ." *Doe v. Bd. of Regents*, 280 Neb. 492 (2010) (citing *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896 (6th Cir. 2009)). Criticizing and rejecting these cases, including the Sixth Circuit's decision here, the Supreme Court of Nebraska noted that "[i]n *Twombly*, the Supreme Court specifically stated that it was not requiring 'heightened fact pleading of specifics.'" *Id.* (citing *Twombly*, 550 U.S. at 570).

Finally, a magistrate judge in *Escuadra v. GeoVera Specialty Ins. Co.*, No. 09-Civ-974 (E.D.Tex. Sep. 9, 2010), *available at* 2010 U.S.Dist.LEXIS 94301, *24-*30 & n.14, has cited the Sixth Circuit's decision as creating a conflict among the circuits' interpretations of *Twombly*. In *Escuadra*, the judge noted that while "[m]any courts, including the Fifth Circuit" hold that a "plaintiff's factual allegations (and associated inferences) need not tell a *more* plausible story than alternative explanations," "[o]ther federal appellate courts [including the Sixth Circuit's decision in this case], appear to embrace a more restrictive interpretation." *Id.* (citing *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, and explaining, "where defendants' explanation is 'just as likely' as plaintiffs' explanation, plaintiffs' claim is implausible") (emphasis in original).

Accordingly, contrary to respondents' assertion that the Sixth Circuit's decision here is a run-of-the-mill application of *Twombly*'s plausibility standard, recent developments show that the decision below continues to be read by courts and practitioners as an extreme interpretation that improperly imposes a heightened pleading standard in conflict with interpretations of this Court and other courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH M. ALIOTO, JR.
Counsel of Record
JOSEPH M. ALIOTO, SR.
THOMAS PAUL PIER
ALIOTO LAW FIRM
555 California Street
Thirty-First Floor
San Francisco, California 94104
(415) 434-8900

September 21, 2010 *Counsel for Petitioners*